


08-(Mass Conduct Code)-A lawyer shall neither knowingly make a false statement of fact or law to a tribunal nor

 No results found for "A lawyer shall neither knowingly make a false statement of fact or law to a tribunal nor fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or _____ act by the client"the Clause has been understood to contain a substantive component.

Results for A lawyer shall neither knowingly make a false statement of fact or law to a tribunal nor fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or _____ act by the client"the Clause has been understood to contain a substantive component (without quotes):

Chapter 3 - Rules of Professional Conduct

RULE 3.3 CANDOR TOWARD THE *TRIBUNAL*. (a) **A lawyer** shall **not knowingly**: (1) **make a false statement of material fact or law to a tribunal**; (2) fail to **disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a** ... (3) fail to disclose to the tribunal legal authority in the controlling ...
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RULE 3:07 MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT

ADVOCATE

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RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The principle underlying the provision that a criminal defense lawyer may put the prosecution to its proof in all circumstances often will have equal application to proceedings in which the involuntary commitment of a client is in issue. The option granted to a criminal defense lawyer to defend the proceeding so as to require proof of every element of a crime does not impose an obligation to do so. Sound judgment and reasonable trial tactics may reasonably indicate a different course.

Corresponding ABA Model Rule. Identical to Model Rule 3.1.

Corresponding Former Massachusetts Rule. DR 7-102 (A) (1-2), DR 7-106.

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Corresponding ABA Model Rule. Identical to Model Rule 3.2.

Corresponding Former Massachusetts Rule. DR 7-102 (A) (1); see also DR 7-101, S.J.C. Rule 3:08, PF 2, DF 2.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except as provided in Rule 3.3 (e);

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3 (e). If a lawyer has offered, or the lawyer's client or witnesses testifying on behalf of the client have given, material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation; if the lawyer discovers this intention before trial, the lawyer shall seek to withdraw from the representation, requesting any required

permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying. If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

Comment

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit, or assist the client in committing, a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Special Meaning of "Assistance"

[2A] Comment 3 to Rule 4.1 states the general rule that the word "assisting" refers to that level of assistance that would render a third party liable for another's crime or fraud, i.e., assistance sufficient to render one liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law. However, the concept of assisting has a special meaning in Rule 3.3 because it deals with a lawyer's conduct before a tribunal. The term assisting in Rule 3.3 is not limited to conduct that makes the lawyer liable as an aider, abettor or joint tortfeasor. Rule 3.3(a) is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against the contamination of the judicial process. Thus, for example, a lawyer who knows that a client has committed fraud on a tribunal and has refused to rectify it must disclose that fraud to avoid assisting the client's fraudulent act.

Misleading Legal Argument

[3] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[6] Except in the defense of a criminal accused, an advocate must disclose, if necessary to rectify the situation, the existence of the client's deception to the court or to the other party. The lawyer's obligation to disclose also extends to material evidence given by others on behalf of the client. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

[7] In the defense of a criminally accused, the lawyer's duty to disclose the client's intent to commit perjury or offer of perjured testimony is complicated by state and federal constitutional provisions relating to due process, right to counsel, and privileged communications between lawyer and client. While there has been intense debate over a lawyer's duty in such situations in criminal cases, this rule proposes to accommodate these special constitutional concerns in a criminal case by providing specific procedures and restrictions to be followed in the rare situations in which the client states his intention to, or does, offer testimony the lawyer knows to be perjured in a criminal trial.

[8] In such cases, it is the clear duty of the lawyer first to seek to persuade the client to refrain from testifying perjurally. That persuasion should include, at a minimum, advising the client that such a course of action is unlawful, may have substantial adverse consequences, and should not be followed. If that persuasion fails, and the lawyer has not yet accepted the case, the lawyer must not agree to the representation. If the lawyer learns of this intention after the lawyer has accepted the representation of the client, but before trial, and is unable to dissuade the client of his or her intention to commit perjury, the lawyer must seek to withdraw from the representation. The lawyer must request the required permission to withdraw from the case by making an application ex parte before a judge other than the judge who will preside at the trial. The lawyer must request that the hearing on this motion to withdraw be heard in camera, and that the record of the proceedings, except for an order granting a motion to withdraw, be impounded.

[9] Once the trial has begun, the lawyer may seek to withdraw from the representation but no longer has an obligation to withdraw if the lawyer reasonably believes that to do so would prejudice the client. If the lawyer learns of the client's intention to commit perjury during the trial, and is unable to dissuade the client from testifying falsely, the lawyer may not stand in the way of the client's absolute right to take the stand and testify. If, during a trial, the lawyer knows that his or her client, while testifying, has made a perjured statement, and the lawyer reasonably believes that any immediate action taken by the lawyer will prejudice the client, the lawyer should wait until the first appropriate moment in the trial and then attempt to persuade the client confidentially to correct the perjury.

[10] In any of these circumstances, if the lawyer is unable to convince the client to correct the perjury, the lawyer must not assist the client in presenting the perjured testimony and must not argue the false testimony to a judge, or jury or appellate court as true or worthy of belief. Except as provided in this rule, the lawyer may not reveal to the court that the client intends to perjure or has perjured himself or herself in a criminal trial.

[11] Reserved.

[12] Reserved.

Duration of Obligation

[13] A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to Be False

[14] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Whether constitutional requirements affect the resolution of this issue is beyond the scope of these comments.

Ex Parte Proceedings

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. Rule 3.3(d) does not change the rules applicable in situations covered by specific substantive law, such as presentation of evidence to grand juries, applications for search or other investigative warrants and the like.

[16] When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit or the settlement of a suit involving a minor, the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

Corresponding ABA Model Rule. Identical in (a) to (d) to Model Rule 3.3 except in (a) (2) and (4); in (b) phrase "including all appeals" added; (e) new.

Corresponding Former Massachusetts Rule. DR 7-102, DR 7-106 (B), S.J.C. Rule 3:08, PF 12, DF 13.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other

material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information;

(g) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying

(2) reasonable compensation to a witness for loss of time in attending or testifying

(3) a reasonable fee for the professional services of an expert witness;

(h) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter; or

(i) in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or

one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

[5] Paragraph (g) carries over the provision of former DR 7-109(C) concerning the payment of funds to a witness. Compensation of a witness may not be based on the content of the witness's testimony or the result in the proceeding. A lawyer may pay a witness reasonable compensation for time lost and for expenses reasonably incurred in attending the proceeding. A lawyer may pay a reasonable fee for the professional services of an expert witness.

[6] Paragraph (h) is taken from former DR 7-105(A), but it prohibits filing or threatening to file disciplinary charges as well as criminal charges solely to obtain an advantage in a private civil matter. The word "private" has been added to make clear that a government lawyer may pursue criminal or civil enforcement, or both criminal and civil enforcement, remedies available to the government. This rule is never violated by a report under Rule 8.3 made in good faith because the report would not be made "solely" to gain an advantage in a civil matter.

[7] Paragraph (i) is taken from former DR 7-106(C)(8) concerning conduct before a tribunal that manifests bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation of any person. When these factors are an issue in a proceeding, paragraph (i) does not bar legitimate advocacy.

Corresponding ABA Model Rule. Identical to Model Rule 3.4(a), (b), (c), (d), (e), and (f); (g) from DR 7-109 (C), (h) from DR 7-105, and (i) from DR 7-106 (C) (8) are new.

Corresponding Former Massachusetts Rule. DR 7-102 (A) (6); DR 7-105; DR 7-106 (A) and (C), DR 7-109, S.J.C. Rule 3:08 PF 4, DF 9; See also DR 7-103 (B), DR 7-104 (A)(2).

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law;
- (c) engage in conduct intended to disrupt a tribunal; or
- (d) after discharge of the jury from further consideration of a case with which the lawyer was connected, initiate any communication with a member of the jury without leave of court granted for good cause shown. If a juror initiates a communication with such a lawyer, directly or indirectly, the lawyer may respond provided that the lawyer shall not ask questions of or make comments to a member of that jury that are intended only to harass or embarrass the juror or to influence his or her actions in future jury service. In no circumstances shall such a lawyer inquire of a juror concerning the jury's deliberation processes.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified

in S.J.C. Rule 3:09, the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Corresponding ABA Model Rule. Identical to Model Rule 3.5(a), (b) and (c); (d) added from DR 7-108 (D).

Corresponding Former Massachusetts Rule. DR 7-106, DR 7-108 (D), DR 7-110 (B), S.J.C. Rule 3:08, PF 1, DF 1.

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation, and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time, and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) This rule does not preclude a lawyer from replying to charges of misconduct publicly made against

him or her or from participating in the proceedings of a legislative, administrative, or other investigative body.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

[6] (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

[7] (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

[8] (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

[9] (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

[10] (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

[11] (6) the fact that a defendant has been charged with a crime, unless there is included therein a

statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[12] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[13] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Corresponding ABA Model Rule. Almost identical to Model Rule 3.6 except paragraph (e) is derived from DR 7-107 (I).

Corresponding Former Massachusetts Rule. DR 7-107.

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer

prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

Corresponding ABA Model Rule. Identical to Model Rule 3.7.

Corresponding Former Massachusetts Rule. DR 5-101 (B), DR 5-102 (A).

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless a court first has obtained from the accused a knowing and intelligent written waiver of counsel;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;
- (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
 - (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (iii) there is no other feasible alternative to obtain the information; and
 - (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding; (g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments

that have a substantial likelihood of heightening public condemnation of the accused;

(h) not assert personal knowledge of the facts in issue, except when testifying as a witness;

(i) not assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the prosecutor may argue, on analysis of the evidence, for any position or conclusion with respect to the matters stated herein; and

(j) not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. See also S.J.C. Rule 3:08, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Unlike the language of ABA Model Rule 3.8(c), paragraph (c) permits a prosecutor to seek a waiver of pretrial rights from an accused if the court has first obtained a knowing and intelligent written waiver of counsel from the accused. The use of the term "accused" means that paragraph (c) does not apply until the person has been charged. Paragraph (c) also does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (g) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Paragraphs (h) and (i), which do not appear in the ABA Model Rules, are taken from DR 7-106(C)(3) and (4), respectively. They state limitations on a prosecutor's assertion of personal knowledge of facts in issue and the assertion of a personal opinion on matters before a trier of fact, but under paragraph (i) a prosecutor may contend, based on the evidence, that the trier of fact should reach particular conclusions.

Corresponding ABA Model Rule. Model Rule 3.8, paragraphs (a) - (g) except for (c) (written waiver) and (f) (2) which is from former Model Rule 3.8 (f) (2) and S.J.C. Rule 3:08, PF 15; paragraphs (h) and (i) are taken from DR 7-106 (C) (3) and (4).

Corresponding Massachusetts Rule. See S.J.C. Rule 3:08, Standards Relating to the Prosecution

Function.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5(a) through (c).

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

[4] Unless otherwise expressly prohibited, ex parte contacts with legislators and other persons acting in a legislative capacity are not prohibited.

Corresponding ABA Model Rule. Identical to Model Rule 3.9, except for reference to paragraphs (a) - (c) of Rule 3.5.

Corresponding Former Massachusetts Rule. DR 7-106 (B) (2).

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